ATTORNEY FOR APPELLANT:

**WILLIE HARRIS**
Gary, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**GARY DAMON SECREST**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

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| ALTHIRTY HUNTER, JR. | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 45A03-0602-CR-00071 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee. | ) | |

APPEAL FROM THE LAKE SUPERIOR COURT
CRIMINAL DIVISION, ROOM IV
The Honorable Thomas P. Stefaniak, Judge
Cause No. 45G04-0409-MR-00007

**January 31, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

Appellant-Defendant, Althirty Hunter, Jr., challenges his convictions and sentence following a jury trial for Murder, a felony;[1] two counts of Class A felony Attempted Murder;[2] and two counts of Battery as a Class C felony.[3] Hunter's sole claim upon appeal is that he was denied a fair trial due to prosecutorial misconduct during closing argument.

We affirm.[4]

Evidence at trial indicated that on September 11, 2004, Hunter arrived with Calvin Lyons at Jawuan Blake's residence in Gary at approximately 3:00 p.m. and purchased some marijuana from Blake. Blake shared his residence with Dino Moore, who was present that day. According to Blake, Hunter called him after leaving his residence because Hunter believed he had unintentionally dropped $100 on Blake's floor. Apparently Blake was hosting a party that evening and several people, including Jeff Morgan, were gathered at his home when Hunter returned at about 9:00 p.m. Blake testified that Hunter approached him and others in the kitchen, pulled out a gun, and indicated he wished to recover his $100. According to Blake, Lyons then also pulled out a gun, whereupon Moore grabbed Hunter. Others inside the house, including Blake,

[1] Ind. Code § 35-42-1-1 (Burns Code Ed. Repl. 2004).

[2] Ind. Code §§ 35-42-1-1; 35-41-5-1 (Burns Code Ed. Repl. 2004).

[3] Ind. Code § 35-42-2-1 (Burns Code Ed. Repl. 2004).

[4] We are struck by appellant's counsel's summary treatment of the facts and argument in his brief. We remind counsel that the statement of facts shall be in narrative form and that argument shall be supported by cognizable reasoning. Ind. App. R. 46(A)(6)(c); 46(A)(8)(a).

grabbed guns, and a firefight ensued. Moore was killed, and Blake and Morgan were injured.

Hunter was charged on September 16, 2004 with murder, two counts of attempted murder, and two counts of battery. In a November 28, 2005 trial, the State did not allege that Hunter was the "trigger man" but proceeded under a theory of accomplice liability. Tr. at 496. During closing argument at trial, Hunter's defense counsel claimed that during the firefight Hunter had not shot anyone and instead had been shot himself. In rebuttal argument, the State responded that there was no evidence that Hunter had been shot. Following objection and a motion for mistrial by defense counsel, the trial court overruled the objection but admonished the jury by stating, "[A] defendant in a criminal case and this defendant has no obligation to present any evidence whatsoever." Tr. at 516. The State resumed its rebuttal by restating its argument that there was no evidence, such as blood in his vehicle, indicating Hunter had been shot. Defense counsel made no further objection.

The jury found Hunter guilty on all counts. Following a January 13, 2006 sentencing hearing, the court sentenced Hunter to an aggregate eighty-five year sentence. (Tr. 557) Hunter filed his notice of appeal on February 13, 2006.

Upon appeal, Hunter argues that the prosecutor's statement claiming there was no evidence Hunter had been shot was an improper comment upon his Fifth Amendment right to remain silent and amounted to prosecutorial misconduct warranting a new trial. Hunter further argues that the prosecutor's subsequent statements regarding the lack of evidence that he had been shot, although not objected to, amounted to fundamental error.

If an appellant properly preserves the issue of prosecutorial misconduct for appeal, the reviewing court first determines whether misconduct occurred, and if so, whether it had a probable persuasive effect on the jury. Evans v. State, 855 N.E.2d 378, 384 (Ind. Ct. App. 2006) (citing Ritchie v. State, 809 N.E.2d 258, 268-69 (Ind. 2004)), reh'g denied, trans. pending. Although often phrased in terms of grave peril, a claim of improper argument to the jury is measured by the probable persuasive effect of any misconduct on the jury's decision. Id. The probability of impact upon the jury may be reflected by repeated instances of misconduct which would evidence a deliberate attempt to improperly prejudice the defendant. Id.

The Fifth Amendment privilege against self-incrimination is violated "when a prosecutor makes a statement that is subject to reasonable interpretation by a jury as an invitation to draw an adverse inference from a defendant's silence." Dumas v. State, 803 N.E.2d 1113, 1118 (Ind. 2004) (quotation omitted). However, statements by the prosecutor concerning the uncontradicted nature of the State's evidence do not violate the defendant's Fifth Amendment rights. Id. Rather, comment on the lack of defense evidence is proper so long as the State focuses on the absence of any evidence to contradict the State's evidence and not on the accused's failure to testify. Id.

Here, the prosecutor appeared to focus not on Hunter's failure to testify, but upon the lack of direct evidence, specifically any eyewitness account, physical evidence, or a medical record, supporting defense counsel's claim that he had been shot. The prosecutor's comments were based upon an evaluation of the evidence as a whole, not upon an indictment of Hunter's failure to testify. See Lyles v. State, 834 N.E.2d 1035,

1046-47 (Ind. Ct. App. 2005) ("[W]e will not reverse if the prosecutor's comment, in its totality, focuses on evidence other than the defendant's failure to testify."), trans. denied; Taylor v. State, 677 N.E.2d 56, 61 (Ind. Ct. App. 1997), trans. denied. We recognize that witness Morgan indicated he had pointed a gun in the direction of Hunter's back, fired it, and that Hunter had screamed out, "I'm hit." Tr. at 178. To the extent the State's comment that there was no evidence before the jury that Hunter had been shot was based upon contradicted evidence, we further recognize that prosecutors are entitled to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable. Dumas, 803 N.E.2d at 1118. Here, in closing argument, defense counsel continually pointed to Hunter's alleged plight as a shooting victim in arguing that Hunter was acting in self-defense.[5] We conclude the prosecutor was entitled to counter this argument by pointing to and asking the jury to reflect upon Hunter's specific evidence—or lack thereof—to support this self-defense claim.

We further note that even if the prosecutor's statements constituted misconduct, the trial court's admonishment to the jury served as an appropriate remedy such that its denial of a mistrial does not constitute an abuse of discretion. As a freestanding ground for mistrial, we review the trial court's rulings as to misconduct for abuse of discretion. Ritchie, 809 N.E.2d at 269. If a prosecutorial reference constitutes misconduct, in order to grant a mistrial, the trial court must determine that no lesser step could have rectified the situation. Id. "The trial court has discretion in determining whether to grant a

[5] More specifically, as Hunter was never the alleged "trigger-man," it was the defense's position that Lyons was acting in defense of Hunter.

mistrial, and the decision is afforded great deference on appeal because the trial court is in the best position to gauge the surrounding circumstances of the event and its impact on the jury." Id. (quotation omitted). In overruling defendant's objection and request for mistrial, the trial court admonished the jury that "a defendant in a criminal case and this defendant has no obligation to present any evidence whatsoever." Tr. at 516. Having found no prosecutorial misconduct as well as a proper admonishment, we decline Hunter's request for a new trial.

Hunter also argues that following the trial court's admonishment, the prosecutor's argument restating that Hunter lacked evidence that he had been shot, although not objected to, constituted fundamental error. We first note that defense counsel's objection had been overruled, so this claim is more properly framed in terms of trial court error. See Evans, 855 N.E.2d at 384. To rise to the level of fundamental error, we must find error which is so prejudicial to the rights of the defendant so as to make a fair trial impossible. Glotzbach v. State, 783 N.E.2d 1221, 1226 (Ind. Ct. App. 2003). Based upon our above reasoning that the prosecutor's statements regarding Hunter's lack of evidence did not implicate his constitutional privilege against self-incrimination, we find no reason to conclude he was denied a fair trial due to the prosecutor's reiteration, following defense counsel's objection, that Hunter lacked evidence that he had been shot.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.